ATTORNEY FOR APPELLANT:

JOHN PINNOW
Greenwood, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

NICOLE M. SCHUSTER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

RACHAEL GARDNER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0602-CR-81
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Jane Magnus-Stinson, Judge
Cause No. 49G06-0405-FD-79858

December 28, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Rachael Gardner ("Rachael") appeals from her convictions for two counts of Child Molesting, as Class A felonies; Child Molesting, as a Class C felony; and Child Exploitation, as a Class C felony. She also appeals her sentence on the convictions and the restitution order. We address three issues on review, namely:

1. Whether the evidence is sufficient to support her convictions for aiding in child molesting and aiding in child exploitation.

2. Whether the trial court abused its discretion when it imposed consecutive sentences.

3. Whether the trial court abused its discretion when it ordered her to pay $7800 in restitution.

We affirm in part, reverse in part, and remand with instructions.

FACTS AND PROCEDURAL HISTORY

In 2000, Rachael married Gary Gardner ("Gary") in Kansas, where the couple resided. Before the marriage, Rachael had a daughter, D.R., from another relationship and a daughter, M.G., with Gary. Thereafter, the family relocated to Indiana, where Rachael gave birth to their son.[1] At some point, Rachael and Gary took photographs of themselves naked on a bed with D.R. and M.G.

Rachael worked outside the home, and Gary was a college student. The two alternated caring for the children, and Gary was often left alone with the children. Rachael's colleague, Cynthia Wittwer ("Wittwer"), occasionally watched Rachael and Gary's children, and in return Gary watched Wittwer's daughter, A.C.

[1] The son was not alleged to be a victim of the abuse at issue in this case and has since died.

In August 2003, Rachael found on a laptop computer photographs taken by Gary in which the children were naked and provocatively posed. Gary told Rachael that he had molested D.R., and, at Rachael's request, Gary made a list of the acts he had committed. Also, at Rachael's request, Gary promised not to molest D.R. again, and Rachael asked D.R. to inform her if Gary molested the child again. At that time, Gary and D.R. denied that Gary was still molesting D.R.

D.R. later told Rachael that the molestation by Gary continued, but Rachael took no steps to stop the molestations or avoid leaving the children alone with Gary. The molestation of D.R. included Gary performing oral sex on D.R., D.R. performing oral sex on Gary, and D.R. fondling Gary's penis. Gary was molesting D.R. approximately three times per month by Christmas 2003. Gary also took photographs of D.R., M.G., and/or A.C. in provocative poses. Rachael was not present when Gary committed such acts.

In May 2004, a photograph development laboratory in Illinois notified the Illinois State Police that the lab had received from a Greenwood, Indiana, Meijer store a roll of film containing obscene pictures of girls. The Illinois State Police contacted the Greenwood Police Department, who traced the photographs to D.R. through her school. Detective Mark Henninger of the Marion County Sheriff's Department interviewed Rachael, who initially denied knowing anything about Gary photographing or molesting D.R. She cried and appeared shocked at the news.

After the interview, Detective Henninger became aware that Gary had previously admitted to molesting D.R. and that he had told Rachael about such acts in August 2003. Detective Henninger subsequently interviewed Rachael again, at which time she admitted

that Gary had previously told her that he had molested D.R. and had written out of list of the acts performed. In that interview, Rachael stated that she had not called the police because she "needed a babysitter." Transcript at 105, 108. She also expressed concern that the children might be taken from her and then be molested or killed in foster care.

The State charged Gary with four counts of child molesting, as Class A felonies; two counts of child molesting, as Class C felonies; one count of child exploitation, as a Class C felony; one count of possession of child pornography, as a Class D felony; and two counts of neglect of a dependent, as a Class D felony. The State later amended that information to charge Rachael with two counts of neglect of a dependent, as Class D felonies; four counts of aiding in child molesting, as Class A felonies; two counts of aiding in child molesting, as Class C felonies; one count of aiding in child exploitation, as a Class C felony; and three counts of neglect of a dependent, as Class C felonies. Gary pleaded guilty to multiple counts of child molesting and child exploitation and was sentenced to ninety years. After a bench trial, the trial court found Rachael guilty of one count of neglect of a dependent, M.G., as a Class D felony; two counts of aiding in child molesting, as Class A felonies; one count of aiding in child molesting, as a Class C felony; and one count of aiding in child exploitation, as a Class C felony.[2] The trial court entered a judgment of conviction accordingly and sentenced Rachael to one and one-half years for neglect of M.G.; thirty years for one count of child molesting, as a Class A felony, to be served consecutive to the sentence for neglect; thirty years for the second

[2] The trial court determined that the State had proved count 8, alleging neglect of D.R., as a Class D felony, and count 18, alleging neglect of D.R., as a Class C felony. But the trial court also determined that double jeopardy barred convictions for both neglect of D.R. and child molesting of D.R. Thus, the trial court did not enter judgment of conviction on counts 8 and 18.

count of child molesting, as a Class A felony; four years for child molesting, as a Class C felony, to be served consecutive to the sentence on the first count of child molesting; and four years for child exploitation, also to be served consecutive to the sentence on the first count of child molesting. Rachael's aggregate sentence is thirty-nine and one-half years executed. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Sufficiency of Evidence

Rachael argues that the evidence is insufficient to support her convictions for aiding in child molesting and aiding in child exploitation. When reviewing a sufficiency of the evidence claim, we neither reweigh the evidence nor judge the credibility of witnesses. Grim v. State, 797 N.E.2d 825, 830 (Ind. Ct. App. 2003). Rather, we consider only the evidence that is favorable to the judgment along with the reasonable inferences to be drawn therefrom to determine whether there was sufficient evidence of probative value to support a conviction. Id. We will affirm the conviction if there is substantial evidence of probative value from which a reasonable trier of fact could have drawn the conclusion that the defendant was guilty of the crime charged beyond a reasonable doubt. Id.

Rachael does not argue that Gary did not commit the crimes, only that she did not aid in the commission of those crimes. To convict Rachael of child molesting, the State must prove that she aided, induced, or caused Gary to perform or submit to sexual intercourse or deviate sexual conduct with a child under fourteen years of age. See Ind. Code §§ 35-42-4-3(a), 35-41-2-4. To convict her of child exploitation, the State must

prove that she aided, induced, or caused Gary to knowingly or intentionally photograph a performance or incident that included sexual conduct by D.R., M.G., or A.C. See Ind. Code §§ 35-42-4-4, 35-41-2-4.

In determining whether a person aided another in the commission of a crime, we consider the following factors: (1) presence at the scene of the crime; (2) companionship with another engaged in criminal activity; (3) failure to oppose the crime; and (4) a defendant's conduct before, during, and after the occurrence of the crime. Garland v. State, 719 N.E.2d 1236, 1238 (Ind. Ct. App. 1999). While the defendant's presence during the commission of the crime or his failure to oppose the crime are, by themselves, insufficient to establish accomplice liability, the fact-finder may consider them along with other facts and circumstances tending to show participation. Id. In order to sustain a conviction as an accomplice, there must be evidence of the defendant's affirmative conduct, either in the form of acts or words, from which an inference of common design or purpose to effect the commission of a crime may reasonably be drawn. Boyd v. State, 766 N.E.2d 396, 399 (Ind. Ct. App. 2002) (citing Peterson v. State, 699 N.E.2d 701, 706 (Ind. Ct. App. 1998)).

Here, Rachael first learned in August 2003 that Gary had molested and taken provocative photographs of D.R. She made Gary list all of the acts he had performed on D.R. and made him promise not to repeat such acts. She also made D.R. promise to tell her if Gary's conduct continued. Rachael did not report Gary's conduct, nor did she take away his camera or take steps to prevent him from being alone with the children. Indeed, Gary testified that, after Rachael first learned of his conduct with D.R., "it seemed like

she separated herself from [Gary and the children]" and that she left Gary home with the children even more. Transcript at 57. Rachael even allowed a friend to leave her young daughter, A.C., alone with Gary. And, several months later, Rachael became pregnant with Gary's fourth child.

The evidence noted above shows that Rachael's absence allowed the crimes to continue, she continued her relationship with Gary, and she failed to take steps to prevent the crimes from recurring. Despite such evidence, the record does not support her convictions for aiding in child molesting and aiding in child exploitation as an accomplice. Specifically, we have searched the record in vain for evidence to support the judgment, namely, evidence showing whether and, if so, when Rachael became aware that Gary's illicit conduct continued. Such evidence is necessary to support an inference that her absences, creating opportunities for Gary to be alone with the children, constituted a common design or purpose to effect the crimes. See Boyd, 766 N.E.2d at 399; Peterson, 699 N.E.2d at 706.

The State has not pointed us to, nor have we been able to find, any evidence to show that Rachael had reason to know, after August 2003, that Gary continued to molest and photograph D.R. or any other child, and that, nevertheless, she continued to leave the children alone with him.[3] On the record before us, the State did not prove the mens rea necessary to support Rachael's convictions for aiding in child molesting and aiding in

[3] In an interview with child protective services in May 2004, D.R. said that she told Rachael once after August 2003 that Gary continued to molest her, but the record does not indicate when that communication was made. Thus, we cannot determine whether Rachael left the children alone with Gary after that communication was made and, if so, how many times.

child exploitation. Thus, we must reverse those convictions.[4]

We note that the trial court determined that the State had proved one count of neglect of D.R., as a Class D felony, and one count of neglect of D.R., as a Class C felony. As noted above, the court did not enter judgment of conviction on those counts due to double jeopardy concerns relating to the convictions on the child molesting counts. Because we must reverse the convictions for aiding in child molesting and aiding in child exploitation, we remand to the trial court with instructions to enter judgment of conviction on those neglect counts and to issue an order, without a hearing, sentencing Rachael to the presumptive term of four years for neglect of D.R., as a Class C felony, and to one and one-half years for neglect of D.R., as a Class D felony.

Issue Two: Consecutive Sentences

Rachael argues that the trial court abused its discretion when it imposed consecutive sentences. Specifically, Rachael alleges that the trial court erred when "[1] it ordered presumptive sentences on each count in which it sentenced [Rachael] and [2] did not state [that] it found the aggravating circumstances outweighed the mitigating circumstances." Appellant's Brief at 20. Although we must reverse Rachael's convictions for aiding in child molesting and aiding in child exploitation, we address each contention in turn in light of our instructions to issue an order on remand imposing sentence on the counts alleging neglect of D.R.

Indiana Code Section 35-50-2-7 provides, in relevant part:

[4] Because we must reverse the convictions for child molesting, we need not address Rachael's contention that the information did not adequately allege two counts of child molesting, as Class A felonies.

> Except as provided in [Indiana Code Section 35-50-2-7(d) or (e)], the court shall determine whether terms of imprisonment shall be served concurrently or consecutively. The court may consider the:
>
> > (1) aggravating circumstances in [Indiana Code Section] 35-38-1-7.1(a); and
> >
> > (2) mitigating circumstances in [Indiana Code Section] 35-38-1-7.1(b);
>
> in making a determination under this subsection. The court may order terms of imprisonment to be served consecutively even if the sentences are not imposed at the same time.

Ind. Code § 35-50-2-7(c). That section permits trial courts to determine whether terms of imprisonment shall be served concurrently or consecutively by considering aggravating and mitigating circumstances. Wentz v. State, 766 N.E.2d 351, 359 (Ind. Ct. App. 2002). However, when the trial court finds those circumstances in balance, "there is no basis on which to impose consecutive terms." Id. (quoting Marcum v. State, 725 N.E.2d 852, 864 (Ind. 2000)).

Here, the trial court imposed the presumptive sentence on each count. Neither the statute nor case law requires sentences to be enhanced in order for them to be served consecutively. Thus, to the extent that Rachael contends that the trial court can only impose consecutive sentences when it imposes enhanced sentences, that argument fails.

Rachael also argues that the trial court abused its discretion by ordering consecutive sentences because it did not find that the aggravators outweigh the mitigators. After identifying and assigning weight to aggravators and mitigators, the trial court stated that the "aggravators, in the court's view, at least balance if not outweigh the mitigators. But, I'm going to handle it – rely on them for consecutive sentencing."

Transcript at 237 (emphasis added). As noted above, a trial court must find that the aggravators outweigh the mitigators in order to impose consecutive sentences. See Wentz, 766 N.E.2d at 359.

We are confident that the trial court knows the applicable rule of law. But the words "at least balance if not outweigh" are equivocal. Thus, the trial court did not clearly state that the aggravators outweighed the mitigators in its oral pronouncement of sentence. And neither party has provided this court with a copy of the written sentencing order, thus hampering our review. As such, we remand this case to the trial court with instructions to issue an amended sentencing order and to issue or make any other documents or docket entries necessary. In its amended sentencing order, the trial court shall clarify whether it finds that the aggravators outweigh the mitigators to support the imposition of consecutive sentences. If the trial court clarifies that the aggravators outweigh the mitigators, it may, without a hearing, order the sentences for the three neglect counts to be served consecutively. Otherwise, the trial court shall impose concurrent sentences.[5]

Issue Three: Restitution

Rachael also alleges that the trial court abused its discretion when it ordered her to pay restitution in the amount of $7800 to her children's guardians[6] for their lost wages.

[5] Because we conclude that the record presented does not allow us to determine whether the trial court properly imposed consecutive sentences, we need not, and indeed we cannot, exercise our responsibility under Indiana Appellate Rule 7(B) to review Rachael's sentence until the trial court issues an amended sentencing order.

[6] After police arrested Gary and Rachael, the children came under the guardianship of Rachael's uncle by marriage and his wife.

Specifically, she argues that there was no legal necessity for the guardians to attend the trial and no evidence that the children's guardians lost wages in order to make D.R. or M.G. available for trial or trial preparation. Indeed, Rachael stipulated to certain facts to avoid the need for D.R. or M.G. to testify at trial. Thus, she claims that the $7800 restitution order in favor of the guardians should be vacated. We cannot agree.

It is well settled that only actual expenses incurred by the victim before the date of sentencing may be included in restitution. Ware v. State, 816 N.E.2d 1167, 1179 (Ind. Ct. App. 2004). The amount of actual loss is a factual matter that can be determined only upon the presentation of evidence. Id. We review a restitution order for an abuse of discretion. Davis v. State, 772 N.E.2d 535, 541 (Ind. Ct. App. 2002), trans. denied. But a defendant who fails to raise before the trial court an objection to a restitution order waives that possible error. Id. Here, Rachael did not object to the restitution order at the sentencing hearing. Thus, she has waived the issue for review.[7] See id.

Conclusion

We hold that the evidence is not sufficient to support Rachael's convictions for aiding in child molesting and aiding in child exploitation. The State has not pointed us to, and our search has not found, any evidence in the record to show whether and, if so, when Rachael knew that Gary continued to molest and take provocative photographs of D.R. or any other child. Such evidence was necessary to support an inference that Rachael's conduct, after Gary's confession to her in August 2003, was intended to further

[7] For the first time in her reply brief, Rachael asserts that the trial court committed fundamental error when it entered a restitution order for $7800. It is well settled that a party cannot raise an issue for the first time in his reply brief. Chupp v. State, 830 N.E.2d 119, 126 (Ind. Ct. App. 2005). The issue is waived.

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the commission of additional molestations and exploitation. Thus, we must reverse Rachael's convictions for aiding in child molesting and aiding in child exploitation. As a result of our reversal of Rachael's convictions for aiding in child molesting and aiding in child exploitation, we remand with instructions to enter judgment of conviction on one count of neglect, as a Class D felony, and one count of neglect, as a Class C felony. We further instruct the trial court, without a hearing, to issue an order and any other docket entries necessary to sentence Rachael to the presumptive term of four years for neglect of D.R., as a Class C felony, and to the presumptive term of one and one-half years for neglect of D.R., as a Class D felony.

We also conclude that the trial court's sentencing statement is ambiguous with regard to the balancing of the aggravators and mitigators in relation to the imposition of consecutive sentences. Thus, we also remand to the trial court with instructions to issue an amended sentencing order, without a hearing, which clarifies the balancing of aggravators and mitigators, and to issue or make any other documents or docket entries that may be necessary to implement that order. We also hold that Rachael has waived for review her contention that the trial court erred when it ordered her to pay restitution.

Affirmed in part, reversed in part, and remanded.

BAKER, J., and DARDEN, J., concur.